

Supreme Court, U. S.  
FILED

OCT 28 1979

WILLIAM ROBERT NOLTE, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

— • —  
No. **78-681**  
— • —

**WILLIAM ROBERT NOLTE, Petitioner,**

v.

**THE BUDD COMPANY, Respondent.**

— • —  
**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT**

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No.

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**PETITION FOR WRIT OF CERTIORARI  
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—•—  
William Robert Nolte, respectfully petitions this Court  
to issue a writ of certiorari in order to review the  
Judgment of the United States Court of Appeals for the  
Sixth Circuit.

## OPINIONS BELOW

The Order of the Appeals Court on the Defendant's Motion to Dismiss the Appeal (App. A, infra, pp. A1-A2) is not yet officially reported. The decision of the Court of Appeals denying Plaintiff's Petition for Rehearing En Banc (App. B, infra, p. A3) is not yet officially reported.

## JURISDICTION

In the present case the Plaintiff's cause of action for age discrimination arising out of his termination from the employ of the Defendant was dismissed, Final Judgment being entered on January 5th, 1978. The Defendant's Motion to Dismiss the Appeal for failure to file a timely notice of appeal was granted by the Court of Appeals for the 6th Circuit on June 7th, 1978. The Plaintiff thereupon filed for a Rehearing En Banc. The Court denied this motion by its order which was entered on July 25, 1978.

Jurisdiction in this matter is conferred by 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

Whether the Federal Rules of Appellate Procedure deprive a Federal Circuit Court of Jurisdiction to hear an appeal in cases where a party has filed a notice of appeal with the Court of Appeals, and an appeal bond with the District Court, prior to the end of the 30 day period?

## RULES CONSTRUED

The Court is asked to construe the following provisions in the Federal Rules of Appellate Procedure.

### Rule 3(a)

(a) **Filing the Notice of Appeal.** An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

### Rule 3(c)

(c) **Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

## STATEMENT OF THE CASE

The petitioner began employment with the respondent as a patent agent in 1964. He served competently for a period of slightly more than ten years, and was terminated from the employ of the Defendant-Appellant in 1974.

It is the petitioner's position that his termination was part of a policy of age discrimination which was directed at older workers by the respondent. He filed suit under the Age Discrimination in Employment Act (29 U.S.C. § 621 et. seq.). The Defendant filed a Motion for Summary Judgment which was granted on January 16, 1976 by the District Court.

The decision of the District Court was vacated by the Court of Appeals for the Sixth Circuit. The case was remanded to the District Court for further discovery. The petitioner undertook considerable discovery. The Motion for Summary Judgment was then reheard and the District Court Judge held that the discovery which had taken place failed to uncover evidence sufficient to change his mind about the inadequacy of the petitioner's claim. He reinstated his previous order granting summary judgment to the respondent. The petitioner brought a Motion for reconsideration. This was denied. The Court's order was entered on January 5th, 1978.

The petitioner proceeded to take an appeal from the judgment of the District Court. Being within the 30 day time period allowed for filing a notice of claim of appeal under Rule 4(a) of the Federal Rules of Appellate Procedure, the Plaintiff mailed a notice of appeal to the Court of Appeals, and filed same with the District

Court. The notice of appeal which was filed with the District Court was not docketed and the Court has no record of receiving it. The notice which has been sent to the Court of Appeals was sent to the District Court, but was not docketed by it until after the thirty day time period had run.

The petitioner also filed an appeal bond with the District Court within the time prescribed by Rule 4(a). However, the clerk of the Court returned this document to the petitioner as the District Court had no record of a notice of appeal having been filed.

A document entitled notice of appeal was docketed on February 8th, 1978, after the 30 day time period had elapsed.

The respondent filed a motion to dismiss the appeal on the ground that the Appellate Court was deprived of jurisdiction by failure to file a timely notice of appeal. The petitioner responded to this motion arguing in part that the filing of the appeal bond which contained the essential information required under Rule 3(c) satisfied the jurisdictional requirements that the Court had the power to hear the appeal and that within the context of the case it would be unjust to dismiss the appeal. The petitioner cited caselaw which held that an Appellate Court could consider an appeal bond to be a valid notice of appeal when the appeal bond evidences an intent to take an appeal.

The Court rejected this argument stating:

"The record before us does not indicate nor does counsel state that counsel sought to have the district court file the document construe it as a notice of appeal, or enlarge the notice of appeal

period on grounds of excusable neglect pursuant to Rule 4(a) Federal Rules of Appellate Procedure."

The Court then indicated that it lacked jurisdiction to hear the appeal.

### REASONS FOR GRANTING THE PETITION

There is a split amongst the Circuit Courts as to when a court may construe a technically deficient notice of appeal as fulfilling the requirements of Rule 4(a). Rule 3(c) of the Federal Rules of Appellate Procedure states as follows:

"The Notice of Appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal."

The bond on appeal was filed on or about February 2, 1978 with the Federal District Court. Because of the fact that the docket clerk did not consider the appeal bond to be a Notice of Appeal, she did not docket the appeal bond, but rejected it, and requested another copy of the appeal bond to be filed with the Notice of Appeal on February 8, 1978.

The Clerk of the District Court must accept for filing any papers that are delivered to him. It is not his function to pass on the sufficiency or timeliness of the notice. Such questions are to be determined by the Court of Appeals, see *Graves v. General Insurance Co.*, 381 F2d 517, 11 Fr. Serv. 2d 736.14, Case 1 (CA 10th, 1967).

Rule 3(c) requires that the Notice of Appeal (1) specify the parties taking the appeal (2) designate the judgment or part thereof appealed from, and (3) name the Court to which the appeal is taken. The bond, Plaintiff's Exhibit "2", fulfills all those requirements.

With respect to the first requirement, failure of the notice to specify the appellant by name is an arguably harmless error if, in fact, the notice was filed by the Appellant, and there is no possibility of mistakes as to his identity. *Heinz v. Roberts*, 135 Iowa 748, 110 NW 1034 (1907).

Failure of the notice correctly to designate the court to which the appeal is taken does not vitiate it. Misnomer is immaterial, at least if it is obvious to which appellate court the appeal must go. *Cutting v. Bullerdick*, 178 F2d 774 (CA 9th 1949); *Trivette v. New York Life Ins. Co.*, 270 F2d 198, 2 FR Serv 2d 736.14, Case 1 (CA 6th, 1959) ("Federal District Court of Appeals for the Sixth Circuit" designated); *Graves v. General Ins. Co.*, 381 F2d 517, 11 FR Serv 2d 736.14, Case 1 (CA 10th, 1967) ("Supreme Court of the State of New Mexico" designated).

In connection with this discussion of the effects of defects in the notice of appeal, it should be noted that a variety of papers that failed utterly to comply with Rule 3(c) have been recognized as effective as notices of appeal.

*Crump v. Hill*, 104 F.2d 36, 37-38, 1 FR Serv. 73a.11, Case 1 (CA 5th, 1939), an early decision under former Rule 73(a) of the Federal Rules of Civil Procedure, so ably and succinctly stated the requirements of filing, the reasons behind it, and the spirit in which the

requirement should be interpreted. In pertinent part, the decision was as follows:

"It is true that Rule 73 does specifically provide that the only thing necessary to be done to perfect an appeal is to file notice thereof with the clerk, making it the duty of the clerk to see that notice thereof is served, and that a literal compliance with the rule requires timely filing of the notice with the clerk. The reason for the rule, however, to set the appeal in motion by mere notice without judicial action, makes it quite clear, we think, that the appellant, when he procurred from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal with, and left its service to, the clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But, it would, we think, be a harking bark to the formalistic rigorism of an earlier and outmoded time, as well as a travesty of justice, to hold that the extremely simple procedure required by the Rule is itself a kind of mumbo jumbo, and that the failure to comply formalistically with it defeats substantial rights."

The decisions generally hold that the requirement is discharged if the party attempting to appeal makes a clear assertion of his determination to do so, addressed either to the district court or to the Court of Appeals, within the time allowed for taking the appeal. Thus, the

filing of a petition for leave to appeal in forma pauperis was held to meet the requirements of filing the notice, even where the petition was filed in the Court of Appeals rather than in the District Court. See *Ruth v. Bird*, 239 F.2d 257, 23 FR. Serv 34.41, Case 4 (CA 5th, 1956); *Hoover v. United States*, 268 F2d 787, 2 FR Serv 2d 73a.53, Case 1 (CA 10th, 1959); *Fitzsimmons v. Yeager*, 391 F2d 840 (CA 3d, 1968) (Application for leave to proceed in forma pauperis or application for certificate of probable cause will be treated as notice of appeal in habeas corpus proceedings); *Gerringer v. United States*, 213 F2d 346 (CA DC 1954). See also, *Frace v. Russell*, (CA, 1965) 341 F2d 901, in which a "Brief for Appeal" filed in the Court of Appeals was held a sufficient notice of appeal); *Carter v. Campbell*, 285 F2d 68, 4 FR Serv 2d 73a.14, Case 1 (CA 5th, 1960) (An application to the Court of Appeals for leave to proceed on the original record and the court's grant of such leave was held to constitute an adequate appeal); *Jordan v. United States District Court*, (CA DC 1956) 233 F2d 362, vacated on other ground (1956) 352 U.S. 904, 77 S. Ct. 151, 1 LEd. 2d 114 (A petition for mandamus filed in the Court of Appeals constituted a notice of appeal.); *Richey v. Wilkins*, 335 F2d 1.8 FR Serv 2d 73.1.14, Case 1 (CA 2d 1964) (Notice of appeal filed in the Court of Appeals rather than in the District Court has been held effective.) Finally, in *O'Neal v. United States*, 272 F2d 412 (CA 5th, 1959) (It was held that an appeal bond filed in the District Court can suffice as a notice of appeal).

**CONCLUSION**

The decision of the Sixth Circuit in the present case is in conflict with thrust of the general trend, and is directly in conflict with the decision of the 5th Circuit in *Richey*. Therefore, the Court should grant this petition for certiorari in order to hear the appeal and clear up a conflict amongst the decisions of the Circuit Court.

Respectfully submitted,

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Dated: October 19, 1978

**APPENDIX A****ORDER**

(United States Court of Appeals  
For The Sixth Circuit)

(Filed June 7, 1978)

(William Robert Nolte, Plaintiff-Appellant, v. The Budd Company, Defendant-Appellee - No. 78-1126)

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY,  
Circuit Judges

Appellee has filed a motion to dismiss the appeal for lack of jurisdiction in that the notice of appeal was filed late. Appellant has filed a brief in opposition claiming the notice was timely.

It appears that the district court's judgment was marked "filed" on December 27, 1977 but was not entered on the district court's docket until January 5, 1978. The date of entry begins the 30-day period in which a notice of appeal is to be filed. The 30-day period expired on February 4, 1978, a Saturday, but, pursuant to Rule 26(a), Federal Rules of Appellate Procedure, Monday, February 6, 1978 became the last day in which to file the notice of appeal.

Appellee claims that the additional 3-day period contemplated by Rule 26(c), FRAP, when an act is conditioned upon service of a paper, applies here.

Clearly this rule is inappropriate since Rule 4, FRAP, sets forth that a notice of appeal is to be filed within a period commencing from "... the entry of judgment. . ." See also, *Cashley v. Ford Motor Co.*, 518 F.2d 749 (5th Cir. 1975).

Counsel for the appellee also argues that a bond on appeal was delivered to the district court within the 30-day period and should be construed as a notice of appeal. The bond was apparently not filed and was returned to counsel because a notice of appeal had not been filed. The record before us does not indicate nor does counsel state that counsel sought to have the district court file the document, construe it as a notice of appeal or enlarge the notice of appeal period on grounds of excusable neglect pursuant to Rule 4(a), Federal Rules of Appellate Procedure.

Upon consideration of the motion and it appearing that the failure to timely file a notice of appeal deprives an appellate court of jurisdiction, *Browder v. Director, Department of Corrections*, — U.S. —, 46 U.S.L.W. 4058 (Jan. 10, 1978), *Lindsey v. Perini*, 409 F.2d 1341 (6th Cir. 1969).

It is ORDERED that the motion be and it hereby is granted and the appeal is dismissed.

ENTERED BY ORDER OF THE COURT

s/ John P. Hehman, Clerk

**APPENDIX B**

**ORDER**

(United States Court of Appeals  
For The Sixth Circuit)

(Filed July 25, 1978)

(William Robert Nolte, Plaintiff-Appellant, v. The Budd Company, Defendant-Appellee - No. 78-1126)

BEFORE: PHILLIPS, Chief Judge, LIVELY, Circuit Judge, and PECK, Senior Circuit Judge.

Petitioner-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

s/ John P. Hehman, Clerk of Court